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JOHN T. FEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1079

D. W. WHITE, R. C. THOMPSON and ALVIN HANSON, d/b/a KITSAP AUTOMATIC DISPENSER CO.; E. M. HIGGINS, WM. J. HIGGINS, PETER S. HIGGINS and DALE FISHER, d/b/a AUTOMATIC MERCHANDISERS OF SEATTLE OF THE NORTHWEST, INC., a Washington corporation; OTTO A. SMALL and JAMES P. WORDEN, JR., d/b/a PACIFIC AUTOMATIC; FRANK RUSSO, d/b/a EVERGREEN BEVERAGE CO.; C. J. CLAUSEN, JR., d/b/a INLAND VENDING SERVICE; CARTER W. DULANEY and GEORGE K. LINDBERG, d/b/a BEVERAGE VENDING SERVICE COMPANY; AUTOMAT CO., INC., a Washington corporation; JOHN NECHANICKY and VIC NECHANICKY, d/b/a CANTEEN COMPANY OF WASHINGTON; RICHARD P. NECHANICKY, d/b/a AUTOMATIC CANTEEN CO. OF SPOKANE, *Appellants*,

vs.

THE STATE OF WASHINGTON, *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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THE ARGUS PRESS, SEATTLE

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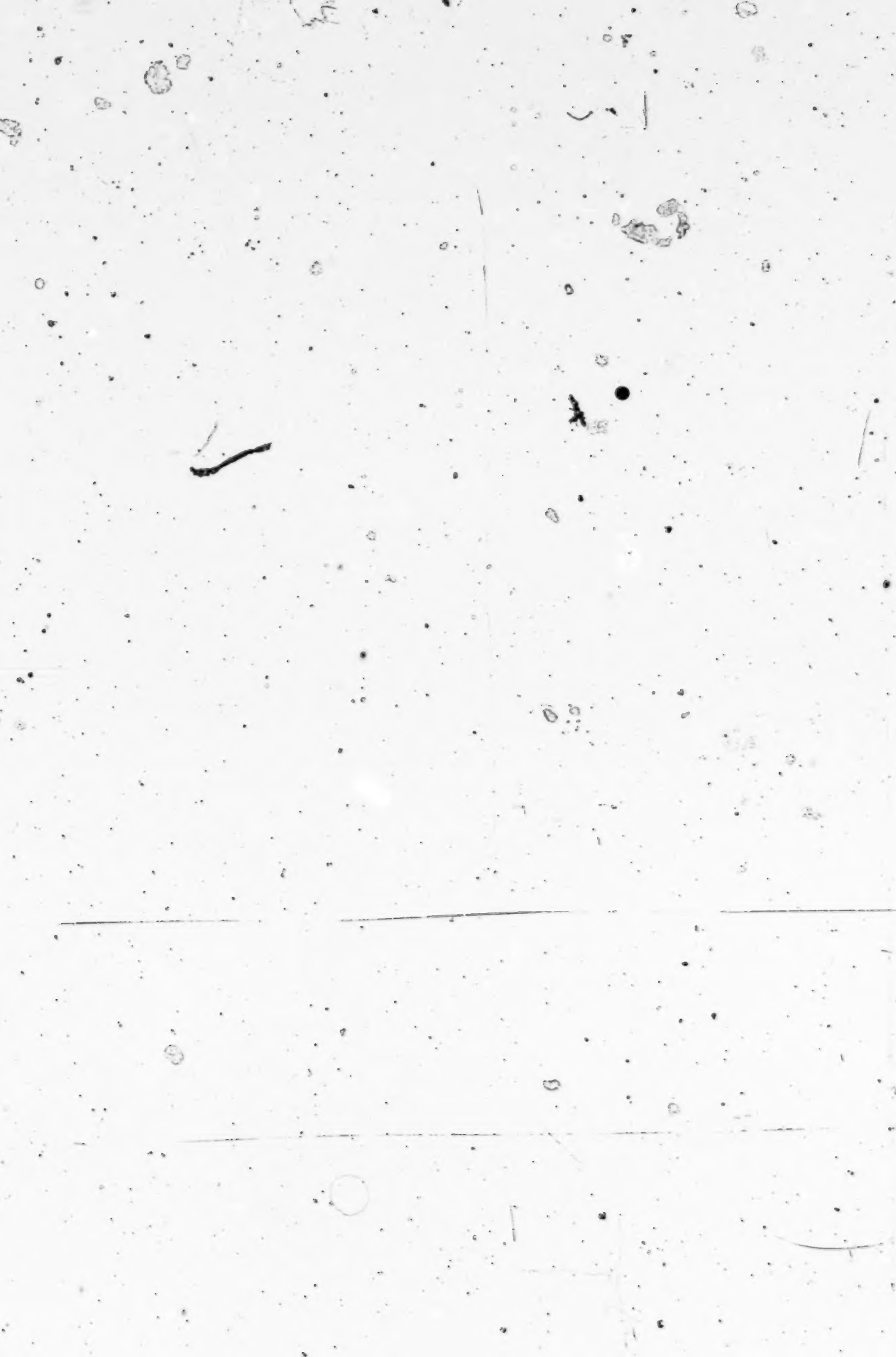

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In the

Supreme Court of the United States

October Term, 1956

DON W. WHITE; B. C. THOMSON and ALVIN HANSON, d/b/a KITSAP AUTOMATIC DISPENSER CO.; F. M. HIGGINS, WM. J. HIGGINS, PETER S. HIGGINS and DALE FISHER, d/b/a AUTOMATIC MERCHANDISERS; SPACARB OF THE NORTHWEST, INC., a Washington corporation; ORIE A. SMALL and JAMES P. WORDEN, JR., d/b/a PACIFIC AUTOMATIC; FRANK RUSSO, d/b/a EVERGREEN BEVERAGE CO.; C. J. CLAUSEN, JR., d/b/a INLAND VENDING SERVICE; CARTER W. DULLANTY and GEORGE K. LINDBERG, d/b/a BEVERAGE VENDING SERVICE COMPANY; AUTOMAT CO., INC., a Washington corporation; JOHN NECHANICKY and VIT NECHANICKY, d/b/a CANTEEN CO. OF WASHINGTON; RICHARD P. NECHANICKY, d/b/a AUTOMATIC CANTEEN CO. OF SPOKANE,

Appellants,

vs.

THE STATE OF WASHINGTON, *Appellee.*

No.....

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

A.

OPINION AND JUDGMENT IN THE COURT BELOW

The opinion of the Supreme Court of the State of Washington is reported at 149 Wash. Dec. 684, 306 P.(2d) 230.

A copy of the opinion is appended hereto (Appendix I) together with a copy of the judgment appealed from (Appendix II).

B.

GROUND OF JURISDICTION

The retail sales tax law of the State of Washington consists of Chapter 180 of Laws of the State of Washington of 1935, as amended, Chapter 82.08 of the Revised Code of Washington, and the regulations issued pursuant thereto. The jurisdiction of the Supreme Court of the United States is invoked in this appeal on the ground that this law, by imposing a tax collected from Appellants on their sales, all of which were for thirteen cents (13¢) or less, without such a tax being collected from the sellers of merchandise for fourteen cents (14¢) or more, is repugnant to and in violation of the equal protection and due process clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, but that the Supreme Court of the State of Washington decided that the law was valid and not repugnant to the Constitution.

(i) Nature of the Proceedings

Pursuant to Chapter 180 of Laws of the State of Washington of 1935, as amended, Appellants petitioned the Washington Tax Commission for a refund of retail sales taxes paid by them to the State of Washington (R. 7-58) RCW 82.32.060. The Washington Tax Commission denied the petition (R. 4) RCW 82.32.170. Thereupon Appellants appealed to the Superior Court

of the State of Washington for Thurston County (R. 1) RCW 82.32.180. The Superior Court entered judgment dismissing the action (R. 65). Appellants then appealed to the Supreme Court of the State of Washington (R. 67) (Rule 14 of Rules on Appeal of Rules of Court adopted by the Supreme Court of the State of Washington), which affirmed the Superior Court judgment (R. 94).

(ii) Judgment Appealed From

The judgment sought to be reviewed is that of the Supreme Court of the State of Washington dated and entered on March 19, 1957 (R. 94). An order denying Appellants' Petition for Rehearing was dated and entered in that court on March 19, 1957 (R. 93). Appellants' Notice of Appeal was filed on April 18, 1957, in the Supreme Court of the State of Washington (R. 95).

(iii) Statutory Provision Conferring Jurisdiction

The statutory provision which confers jurisdiction of this appeal on the Supreme Court of the United States is:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. Sec. 1257 (2)

If perchance an appeal to the Supreme Court of the United States does not lie in this case, request is hereby made that this Jurisdictional Statement be considered a Petition for Writ of Certiorari under the following statutory provision:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. Sec. 1257 (3).

(iv) Cases Sustaining Jurisdiction

The Appellants are attacking the constitutionality of a state statute by appeal from a final judgment of the highest court of the State of Washington, the decision of which is in favor of the validity of the statute. The constitutionality of the statute has been an issue since the inception of the proceedings; the issue was expressly decided by the Washington Supreme Court; and the decision of the constitutional issue was necessary to a determination of the action. The appeal thus falls directly within the provisions of 28 U.S.C. Sec. 1257 (2). Moreover the following United States Supreme Court cases sustain the jurisdiction:

Crowell v. Randell (1836) 35 U.S. 368, 9 L.Ed. 458.

Charleston Federal Savings & Loan Assoc. v. Alderson (1945) 324 U.S. 182, 65 S.Ct. 624, 89 L.Ed. 857:

"Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court." 324 U.S. 185, 89 L.Ed. 861.

Bell's Gap Railroad Co. v. Commonwealth of Pennsylvania (1890) 134 U.S. 232, 10 S.Ct. 533, 33 L.Ed. 892;

Atchison, Topeka & S.F. R. Co. v. Public Utilities Commission (1953) 346 U.S. 346, 74 S.Ct. 92, 98 L.Ed. 51;

Blodgett v. Silberman (1928) 277 U.S. 1, 48 S.Ct. 410, 72 L.ed. 749:

"... so far as the ruling (of the Supreme Court of Errors of the State of Connecticut) was put on the ground that the state could not impose the tax consistently with the due process of law clause of the 14th Amendment, a Federal question is presented which we may consider, ..." 277 U.S. 7, 72 L.Ed. 756.

Louisville & Nashville Railroad Company v. Melton (1910) 218 U.S. 36, 30 S.Ct. 676, 54 L.Ed. 921.

See also annotations "What indication that

state court's decision turned on federal question will move the Supreme Court to review it." 84 L.Ed. 925 and 100 L.Ed. 1200.

(v) Statute Involved

The validity of the Retail Sales Tax Law of the State of Washington is involved. It may be found at

Laws of the State of Washington of 1935, Chapter 180, page 705 *et seq.*

Laws of the State of Washington of 1941, Chapter 76, page 194 *et seq.*

Laws of the State of Washington of 1951, Chapter 44, page 101 *et seq.*

and it is codified as Chapter 82.08 of the Revised Code of Washington.

The text of the pertinent portions of the statute and the material regulation issued pursuant thereto are appended to this Jurisdictional Statement (Appendix III).

C.

QUESTION PRESENTED

The following question is presented by this appeal:

Is the Retail Sales Tax Law of the State of Washington, Chapter 180 Laws of the State of Washington of 1935, as amended, Chapter 82.08 of Revised Code of Washington, and regulations issued pursuant thereto, repugnant to and in violation of the equal protection and due process clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, by imposing a tax collected from Appellants on the sales of the Appellants under

the facts stipulated in this case, such sales being for amounts of thirteen cents (13¢) or less and no such tax being collected from the sellers of merchandise for fourteen cents (14¢) or more?

D.

STATEMENT OF THE CASE

All the facts in this proceeding were stipulated (Pl. Exs. 1 and 8; R. 68 and 73). They disclose that Appellants were engaged in making sales at retail of tangible personal property within the State of Washington; that every sale made by Appellants was for an amount between five cents (5¢) and thirteen cents (13¢) inclusive; that Appellants collected no retail sales tax on any such sales, pursuant to a ruling of the Tax Commission of the State of Washington which provided that no retail sales tax is due on sales between one cent (1¢) and thirteen cents (13¢) inclusive (Ruling of the Washington Tax Commission issued March 21, 1951, effective April 1, 1951, Vol. VII-AR No. 3); that nevertheless Appellants paid substantial amounts to the State of Washington as retail sales tax on such sales each of which was for an amount between five cents (5¢) and thirteen cents (13¢); that all of such sales were made through automatic vending machines; that since the enactment of the Washington Retail Sales Tax Law in 1935, the Washington Tax Commission, in its administration of that law, has at all times required all retail sellers of tangible personal property to remit sales tax to the state in amounts computed by applying the sales tax rate to such sellers' total gross proceeds although the Washington Tax Commission has never

issued a formal ruling or regulation to that effect; and that throughout the State of Washington retail sellers of tangible personal property generally collect the retail sales tax from the buyers of such property in accordance with the bracket system provided for by the aforesaid administrative ruling.

The federal questions sought to be reviewed in this appeal were raised at the very outset of this proceeding and at every stage thereafter. All of the petitions to the Washington Tax Commission for refunds set forth that one of the reasons why the collection and retention of the sums from Appellants by Appellee as and for the Washington Retail Sales Tax is illegal is that if the provisions of the Washington Retail Sales Tax Law, Chapter 180, Laws of the State of Washington of 1935, as amended, Chapter 82.08 of Revised Code of Washington, and regulations issued pursuant thereto, impose a tax on sales for amounts between one cent (1¢) and thirteen cents (13¢),

> "... such statute and regulations are in violation of Section 1 of the Fourteen Amendment to the Constitution of the United States of America ... since the tax levied thereby would in effect impose upon sellers of merchandise at retail for amounts between $.01 and $.13 a three per cent (3%) tax on the gross amount of such sales and no such or similar tax would be imposed on other sellers." See Petition for Hearing and Refund of Don W. White for example. (R. 8)

In the first adversary proceeding, the appeal before the Superior Court of the State of Washington for Thurston County, the parties stipulated:

"... that the issues involved in this action are:

"1. Whether the provisions of the Washington Retail Sales Tax Law, Chapter 180, Laws of 1935, as amended, Chapter 82.08 RCW, and regulations issued pursuant thereto, impose a tax on sales made by petitioners under the facts heretofore stipulated.

"2. If it be held that such statute and regulations issued pursuant thereto do so impose a tax on such sales, whether such statute and regulations are in violation of the equal protection and due process clauses of the Federal and State Constitutions, Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and Sections 3 and 13 of Article I of the Constitution of the State of Washington." Stipulation of Facts and Agreement as to Issues. (R. 72)

The Washington Tax Commission and the Thurston County Superior Court both recognized Appellants' constitutional contention and the Superior Court made the following conclusion of law:

"The imposition of the sales tax on sales made by petitioners as described in the above Findings of Fact, does not violate the equal protection and due process clauses of either the federal or state constitutions." Conclusions of Law entered January 23, 1956, in the Superior Court of the State of Washington for Thurston County. (R. 63)

Appellants' appeal to the Supreme Court of the State of Washington brought the constitutional issue before that court, which recognized the issue in the first paragraph of its opinion and then later specifically passed on it, holding that the statute in question "violates no constitutional right of the appellants" (R. 85).

E.

THE FEDERAL QUESTION IS SUBSTANTIAL

From the foregoing it readily appears that in this proceeding the Appellants have always drawn in question the constitutionality of the Retail Sales Tax Law of the State of Washington, Chapter 180 of Laws of the State of Washington of 1935, as amended, Chapter 82.08 of Revised Code of Washington. See exhibits attached to Notice of Appeal from the Tax Commission of the State of Washington to the Supreme Court (R. 1-58) and Stipulation of Facts and Agreement as to Issues (Pl. Ex. 1, R. 68). This constitutional issue was decided in favor of the validity of the statute by each of the tribunals by which this case has been heard. See Orders of the Washington Tax Commission (R. 4); Conclusion of Law No. II of the Superior Court of the State of Washington for Thurston County (R. 63); and the latter part of the opinion of the Supreme Court of the State of Washington (R. 83-85). Also a decision on the constitutional issue was necessary to a determination of the cause before each tribunal since the constitutionality of the statute involved had specifically been put in issue.

> "Two issues are presented on this appeal: (1) Whether the provisions of the Washington retail sales tax law, chapter 180, Laws of 1935, as amended (RCW chapter 82.08), and regulations issued pursuant thereto, impose a tax on sales made by the appellants under the stipulated facts; and (2) if it be held that such statute and regulations do impose a tax on such sales, whether such statute and regulations are in violation of the equal protection and due process clauses of the

federal and state constitutions — United States constitution, amendment 14, section 1, and Washington constitution, Art. 1, Sections 3 and 12." Opinion of the Supreme Court of the State of Washington (R. 75)

The effect of the judgment of the Supreme Court of the State of Washington is to impose upon sellers of merchandise at retail for amounts between one cent (1¢) and thirteen cents (13¢) a three per cent (3%) tax on the gross amounts of such sales, while no such or similar tax is imposed on other sellers. Appellants contend that this creates an arbitrary classification of taxpayers which is not "based on a real and substantial difference having a reasonable relation to the subject of the particular legislation" involved. *Quaker City Cab Co. v. Pennsylvania* (1928) 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927.

Thus an alleged violation of the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States of America is brought directly before the court in a case involving a large sum of money. The question has never been decided by the United States Supreme Court. Extensive research has disclosed only one case in which the precise point has been passed upon by the highest tribunal of any state.

Retail sales taxes are imposed in a number of states but on two different theories. Some states place the burden of the tax primarily on the seller; other states place the burden of the tax primarily on the buyer. The State of Washington comes within the latter classification.

"The tax . . . is paid by the buyer . . . the duty of paying the tax is imposed upon the buyer; its collection and transmitta[1] to the state upon the seller." *Morrow v. Henneford* (1935) 182 Wash. 625, 633, 47 P.(2d) 1016, 1020.

"Under the provisions of RCW 82.08.050, the liability for the payment of a sales tax is upon the buyer, but the duty to collect and remit it to the tax commission is upon the seller." *Kaeser v. City of Everett* (1955) 47 Wn.(2d) 666, 667, 289 P.(2d) 343, 344.

Only in Ohio has the constitutional issue here involved previously been the subject of a judicial determination by the highest court of a state placing the burden of its retail sales tax primarily on the buyer. The Supreme Court of that state has indicated that imposing a tax upon sellers of merchandise at retail for amounts between one cent (1¢) and thirteen cents (13¢) on the gross amount of such sales while no such or similar tax is imposed on other sellers would be a violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States of America.

"It is always the duty of a court to construe a statute, if possible, in a manner to give it a constitutional operation. In accordance with such rule Section 5546-12a, General Code, should be interpreted as excluding a vendor wholly engaged in the making of separate sales of a commodity at a price less than nine cents per unit, such sales not being taxable under the express terms of Section 5546-2, General Code. If Section 5546-12a were to be applied to such a vendor who collects no tax from the consumer, the vendor would be paying three per cent on his gross retail sales entirely out of his own pocket, while others vendors in the

same vicinity, selling similar and other commodities, some of their sales being taxable and others not, would have the privilege and advantage of deducting 'the amount of tax paid to the state by means of cancelling prepaid tax receipts' for which expenditure they have been reimbursed by the consumer, thus placing them in a more favored position and in some instances, at least, causing them to pay little or nothing. The result would be an unfair discrimination among vendors, in violation of the equal protection clauses of Section 2, Article I of the Constitution of Ohio and the 14th Amendment to the Constitution of the United States." *Winslow-Spacarb, Inc. v. Evatt, Tax Commissioner* (1945) 144 Ohio 471, 59 N.E.(2d) 824, 926.

There are decisions in jurisdictions placing the burden of a retail sales tax primarily upon the seller which indicate that such a discrimination involves no constitutional violation.

Smoky Mountain Canteen Co. v. Kizer (1952) 193 Tenn. 598, 247 S.W.(2d) 69, 72;

F. W. Woolworth Co. v. Gray (1951) 77 N.D. 757, 46 N.W.(2d) 295, 309;

State v. Woods (1942) 242 Ala. 184, 5 So.(2d) 732, 735;

Stevens Enterprise, Inc. v. State Commission of Rev. & Tax. (1956) 179 Kas. 696, 298 P.(2d) 326, 331.

Since these cases consider statutes imposing the burden of the tax on a different basis than does the Washington law, they are relevant only to help Appellee's argument on the merits. At most they indicate a diver-

gence of opinion among lower tribunals which this court should determine.

The discrimination of which Appellants complain is obvious: Sellers of merchandise for thirteen cents (13¢) and less must pay the Washington Retail Sales Tax while sellers of merchandise for fourteen cents (14¢) and more do not. This discrimination arises from a taxing statute and the court's attention is drawn to the fact that the United States Supreme Court has always zealously guarded our people from the unconstitutionality of such statutes. Clearly the federal question exists and it has not been determined by this court.

It is submitted that the question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution.

Respectfully submitted,

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APPENDIX I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DON W. WHITE *et al.*, *Appellants*, vs. THE STATE OF WASHINGTON, *Respondent.*	No. 33651 Department One Filed January 28, 1957

Two issues are presented on this appeal: (1) Whether the provisions of the Washington retail sales tax law, chapter 180, Laws of 1935, as amended (RCW chapter 82.08), and regulations issued pursuant thereto, impose a tax on sales made by the appellants under the stipulated facts; and (2) if it be held that such statute and regulations do impose a tax on such sales, whether such statute and regulations are in violation of the equal protection and due process clauses of the federal and state constitutions—United States constitution, amendment 14, § 1, and Washington constitution, Art. I, §§ 3 and 12.

The stipulated facts on which the case was tried may be summarized as follows:

At all times pertinent to this action, the appellants (plaintiffs in the trial court) were engaged in the business of making sales at retail of tangible personal property within the state of Washington. Every sale made by the appellants was for an amount between five cents and thirteen cents, inclusive, and all were made through automatic vending machines.

The appellants collected no sales tax on any of the sales made by them, pursuant to an administrative ruling of the tax commission, issued March 21, 1951, effective April 1, 1951, Vol. 7, AR No. 3, which provides as follows:

"BRACKET SYSTEM FOR THE COLLECTION OF RETAIL SALES TAX.

"Chapter 44 of the Laws of 1951, abolishing the use of tax tokens in the collection of the Retail Sales Tax, becomes effective on April 1, 1951.

"The Tax Commission, under the authority of section 82.08.060, R.C.W., as amended by said chapter 44 of the Laws of 1951, has adopted the following schedule to govern the collection of the Retail Sales Tax on all sales of tangible personal property made on and after April 1, 1951, to-wit:

"Amount of Sale	Tax Due
1¢ to 13¢	No tax
14¢ to 49¢	1 cent
50¢ to 84¢	2 cents
85¢ to $1.14	3 cents
$1.15 to $1.49	4 cents
$1.50 to $1.84	5 cents
$1.85 to $2.14	6 cents

Et cetera."

The appellants paid to the state of Washington a retail sales tax of 3 per cent of their gross sales during the period involved in this action. None of them made application to the tax commission for authority to pay the tax themselves on their sales made through vending machines, pursuant to the provisions of RCW 82.08.080, and no such authority was granted to any of them by the tax commission.

Throughout the state of Washington, retail sellers of tangible personal property generally collect the retail sales tax from the buyers of such property in accordance with the administrative ruling set out above.

Since the enactment of chapter 180, Laws of 1935, the tax commission, in its administration of that Act, has at all times required all retail sellers of tangible

personal property to remit sales tax to the state in amounts computed by applying the applicable sales tax rate to such sellers' total gross proceeds from all of their retail sales not exempt under RCW 82.08.030, although the tax commission has never issued a formal ruling or regulation to that effect, except that since May 1, 1936, a formal rule of the tax commission has provided that for practical purposes persons owning and operating vending machines are authorized to waive collection of the tax from the customer and to absorb the amount of the tax on the individual sales and to pay directly to the tax commission 3 per cent (2 per cent originally) of the gross sales of or through such machines.

Within two years after the payment of the taxes involved in this suit, the appellants filed with the tax commission their petitions for refund thereof. The tax commission held a hearing on these petitions on January 18, 1954, and issued an order on January 29, 1954, denying the petitions. The appellants duly served and filed a notice of appeal from this order and filed an appeal bond on February 26, 1954, as required by law.

The trial court concluded that the Revenue Act of 1935, as amended, and regulations issued pursuant thereto, impose a retail sales tax upon every retail sale of tangible personal property within this state, including all sales for amounts less than fourteen cents, and that the imposition of the tax on sales made by the appellants does not violate the equal protection and due process clauses of either the federal or state constitutions and dismissed the action.

The pertinent provisions of the statute which is the subject of controversy in this action are as follows:

RCW 82.08.020 "There is levied and there shall be

collected a tax on each retail sale in this state equal to three per cent of the selling price . . ."

RCW 82.08.010 "(1) 'Selling price' means the consideration, whether money, credits, rights, or other property, . . . paid or delivered by a buyer to a seller, all without any deduction on account of the cost of tangible property sold, . . . taxes, or any other expenses whatsoever paid or accrued . . ."

RCW 82.04.040 " 'Sale' means any transfer of the ownership of, title to, or possession of property for a valuable consideration . . ."

RCW 82.04.050 " 'Sale at retail' or 'retail sale' means every sale of tangible personal property . . ."

RCW 82.08.050 "The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the tax commission pursuant to the provisions of RCW 82.08.060. The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the commission . . .,

"In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay it to the commission in the manner prescribed by this chapter, whether such failure is the result of his own acts or the result of acts or conditions beyond his control, he shall, nevertheless, be personally liable to the state for the amount of the tax.

"The amount of tax, until paid by the buyer to the seller or to the commission, shall constitute a debt from the buyer to the seller and any seller who fails or refuses to collect the tax as required

with intent to violate the provisions of this chapter or to gain some advantages or benefit, either direct or indirect, and any buyer who refuses to pay any tax due under this chapter shall be guilty of a misdemeanor.

"Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the commission, the commission may, in its discretion, proceed directly against the buyer for collection of the tax, in which case a penalty of ten per cent may be added to the amount of the tax . . ."

RCW 82.08.060 "The tax commission shall have power to adopt rules and regulations prescribing methods and schedules for the collection of the tax required to be collected by the seller from the buyer under this chapter. The methods and schedules prescribed shall be adopted so as to eliminate the collection of fractions of one cent and so as to provide that the aggregate collections of all taxes by the seller shall, in so far as practicable, equal the amount of tax imposed by this chapter. Such schedules may provide that no tax need be collected from the buyer upon sales below a stated sum and may be amended from time to time to accomplish the purposes set forth herein.

RCW 82.08.070 "Each seller, on or before the fifteenth day of the month succeeding the end of each bimonthly period, shall make out a return for the preceding bimonthly period, upon forms to be provided by the commission, setting forth the amount of all sales, nontaxable sales, taxable sales, the amount of tax thereon, and such other information as the commission may require, sign, and transmit the same to the commission. The commission may require annual returns from any tax-

payer setting forth such additional information as it may deem necessary to correctly determine tax liability. The tax accrued under the provisions of this chapter, whether or not collected from the buyer, shall be paid by the seller to the commission in bimonthly installments at the time of transmitting the return above provided for.

RCW 82.08.080 "The commission may authorize a seller to pay the tax levied under this chapter upon sales made through vending machines and similar devices or where sales are made under conditions of business such as to render impracticable the collection of the tax as a separate item and waive collection of the tax from the customer. No such authority shall be granted except upon application to the commission and unless the commission, after hearing, finds that the conditions of the applicant's business are such as to render impracticable the collection of the tax in the manner otherwise provided. The commission, by regulation, may provide that the applicant, under this section, furnish a proper bond sufficient to secure the payment of the tax."

Sales to which the tax does not apply are listed in RCW 82.08.030. They do not include sales for amounts below thirteen cents.

In support of their contention that the 1951 legislature, in amending Laws of 1935, chapter 180, Sec. 22, so as to authorize the tax commission to issue schedules providing that no tax need be collected on sales under a certain amount (RCW 82.08.060), intended to exempt such sales from the tax, the appellants cite *Mouldeoux v. Maestri*, 197 La. 525, 2 So.(2d) 11, and *Winslow-Spacarb, Inc. v. Evatt*, 144 Ohio St. 471, 59 N.E.(2d) 924. The ordinance involved in the *Mouldeoux* case contained an express requirement that all of the tax col-

lected, whether or not it was in excess of the amount levied, should be paid over to the city. The court held that under the statute as it was administered, the appellants were not required to pay over any tax in excess of the amount collected and consequently, they could not complain that the statute was discriminatory. The ordinance differs from our statute in this respect, that we have no express requirement that all of the tax collected shall be paid over to the state. On the contrary, RCW 82.08.070 provides that the seller shall remit the amount of tax "accrued under the provisions of this chapter, whether or not collected from the buyer," based upon his total sales. The "amount of tax accrued" is, under RCW 82.08.020, an amount equal to 3 per cent of the selling price on each retail sale.

The statute under consideration in *Winslow-Spacarb, Inc. v. Evatt, supra,* contained the express provision, "if the price is less than nine cents, no tax shall be imposed." The only provision found in our statute which is at all similar is the provision authorizing the tax commission to eliminate the necessity of making collections where the sale is under a stated amount. This provision must be read in conjunction with the rest of the statute to determine whether the legislature intended to exempt such sales from taxation.

The respondents cite a number of cases in support of their construction of the statute. These cases, likewise, all involve statutory provisions which differ in one way or another from those enacted in this state. To determine the legislative intent, we must examine the statute in the light of its legislative history, bearing in mind that if the statute is ambiguous, it must be construed in favor of the taxpayer and against the taxing power. *Pacific First Federal Savings and Loan*

Ass'n v. Pierce County, 27 Wn.(2d) 347, 178 P.(2d) 351; *Thys v. State*, 31 Wn.(2d) 739, 199 P.(2d) 68.

The problem in this case, as in all of the cases in which courts have considered the apparent inequities resulting from the imposition of a small sales tax, arises because of the difficulty of administering a tax which necessarily involves fractions of cents. It will be remembered that prior to 1951, the tax on sales involving small amounts was paid by tokens representing fractions of cents. Prior to 1941, the statute provided that the full amount of tax due should be collected on each sale, but even then, there were no tokens issued in denominations small enough to pay the exact amount on sales involving less than five cents. The legislature in 1941 (Laws of 1941, chapter 76, Sec. 4) for the first time authorized the tax commission, in preparing schedules for the collection of the tax, to provide that on sales below a stated sum, no tax need be collected from the buyer. Thereafter, no tax was collected on sales below five cents. In 1951, when the legislature did away with the use of tokens, collections were eliminated on sales below fourteen cents. Nevertheless, since the tax was first imposed, the tax commission has consistently required sellers to report their gross sales and compute the tax payable on the basis of 3 per cent thereof. Authority for this procedure is found in RCW 82.08.070.

It is apparent that the legislature, in enacting the 1951 amendment, intended merely to do away with the cumbersome and burdensome token system and substitute a simpler method of paying the tax, and not to create a new exemption. The appellants attach great significance to the provision which eliminates collections on small sums. However, if the schedule is examined, it will be seen that on sales at or near the top of each bracket, the full amount of the tax is not collected

from the buyer. The theory of the bracket system is that, on sales involving fractions of less than one-half cent, the seller will absorb the tax; whereas on sales involving a tax of more than one-half cent but less than one cent, the buyer will pay an amount in excess of the actual tax. In its over-all application, the system is supposed to yield 3 per cent on all sales, and this is generally found to be true. Of course, there are exceptions, where a seller deals in commodities all of which sell at a price which falls above or below a position in the bracket which yields exactly 3 per cent.

RCW 82.08.020 imposes the tax in these words: "There is levied and there shall be collected a tax on each retail sale in this state equal to three per cent of the selling price. . . ." The duty of payment by the buyer and collection by the seller is modified in the later section (RCW 82.08.050) which provides that the payment and collection shall be in "accordance with the schedule of collections adopted by the tax commission pursuant to the provisions of RCW 82.08.060." The latter section in turn provides that the methods and schedules prescribed shall be adopted so as to eliminate the collection of fractions of one cent and so as to provide that the aggregate collections of all taxes by the seller shall, in so far as practicable, equal the amount of tax imposed, and that such schedules may provide that no tax need be collected from the buyer upon sales below a stated sum. In these provisions, there can be found no intent to eliminate the payment of 3 per cent on aggregate sales; and RCW 82.08.050 provides that in case any seller fails to collect "the tax herein imposed," or having collected the tax, fails to pay it to the commission in the manner prescribed, *whether such failure is the result of his own acts or conditions beyond his control,* he shall nevertheless be liable to the state for the amount of the tax.

It is apparent, in reading the statute as a whole, that a distinction is made between the tax imposed and the tax to be paid by the buyer and collected by the seller. The former remains constant—3 per cent on each sale—while the latter varies according to the schedule which the tax commission is authorized to issue. The inevitable result is that in some instances, a seller will collect more tax than he is required to remit to the state, and in others, he will collect less. The requirement of the statute is simply that the schedule shall be calculated to produce, in the aggregate as nearly as possible, the amount of the tax imposed, while at the same time eliminating the collection of fractions of one cent. It is not suggested that a schedule could be devised which would accomplish this purpose better than the one adopted by the tax commission.

If any doubt remains that the legislature intended each seller to remain responsible for the remittance of 3 per cent on all of his sales, the doubt will be removed when it is observed that the tax commission has consistently interpreted the statute as imposing this requirement, while the legislature has amended the statute on several occasions without rejecting this interpretation. When a statute is ambiguous, the construction placed upon it by the officer or department charged with its administration, while not binding on the courts, is entitled to considerable weight in determining the intention of the legislature; and the persuasive force of such interpretation is strengthened when the legislature, by its failure to amend the statute, silently acquiesces in the administrative interpretation. This is particularly true when, as here, the section is subsequently (1) considered by the legislature, (2) amended in some other particular, and (3) the administrative construction of the section is not repudiated. *State ex rel. Pirak v. Schoettler,* 45 Wn.(2d) 367, 274 P.(2d)

852. And, see, *Paulsell v. Peters*, 9 Wn.(2d) 599, 115 P.(2d) 708.

It is true, as we said in *Morrow v. Henneford*, 182 Wash. 625, 47 P.(2d) 1016, that the duty of paying the tax is imposed upon the buyer, and the duty of collecting and transmitting it upon the seller. However, the statute imposes upon the seller the duty of transmitting the tax, whether or not he collects it, and whether or not his failure to collect it is attributable to his own fault. The tax is imposed upon the transaction (RCW 82.08-.020); the duty of payment in accordance with the adopted schedule is upon the buyer; the duty of remitting the tax in the amount of three per cent of his gross sales is upon the seller.

The appellants point out that the system adopted sometimes results in inequities, as in their case; and consequently, they say, they are denied the equal protection of the laws and are deprived of their property without due process. This would be true if the statute and regulations were discriminatory, or if they provided an arbitrary and unreasonable classification. *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 71 L.ed. 1165, 47 S.Ct. 678; *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 72 L.ed. 927, 48 S.Ct. 553. But the law makes no attempt to discriminate among sellers, nor does it classify them. It is true that it classifies sales for the purpose of applying the rate, but the rate remains constant throughout the schedule, and the schedule applies alike to every seller. In its general application, it imposes no hardship. It is only when a seller chooses to sell only items which are priced at a point on the schedule where less than the full tax is to be collected that he is forced to absorb part or all of the tax, and this is the exception rather than the rule.

In answer to the contention raised by the appellants;

in the case of *Smoky Mountain Canteen Co. v. Kizer*, 193 Tenn. 598, 247 S.W.(2d) 69, the supreme court of Tennessee said:

> "The act does not single out one individual as against another. It treats all alike. Because certain forms of business, as the instant business (also an automatic vending machine business), happen to be conducted in such a manner as to make it impossible to collect this tax from the consumer does not make the act invalid and unconstitutional under the Equal Protection and Due Process clauses of the Constitution. The Legislature may, as long as it made no arbitrary discrimination between these parties, validly levy this tax. There is no such arbitrary discrimination here."

The tax commission of Tennessee used a bracket system almost identical to the one employed in the state of Washington. It is true that in the quoted case, the court held that the tax was levied upon the retailer for the privilege of doing business, and he was given the right to pass the tax on to the consumer, and in that respect the statute differs from that of Washington. But the principal involved is the same. In either case, the discrimination complained of is that most sellers may collect the tax from the consumer, whereas, owing to their mode of doing business, the appellants may not. The reasoning of the Tennessee court is applicable to both.

Quoting Mr. Justice Cardozo, speaking for the Supreme Court of the United States, the Tennessee court said:

> "'We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits. The operation of a general rule will seldom be the same for everyone.

> If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict.' " *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 79 L.ed. 780, 55 S.Ct. 333.

It is significant that the appellants have not suggested a practical way in which they could collect the tax imposed from their customers. If tokens were used, or if an additional penny were collected, this would require the installation of new equipment, the cost of which would no doubt equal or exceed the loss they sustain, if any, by reason of the fact that they pay the tax themselves. The impracticality of this was recognized by the legislature when it enacted Sec. 24, Chapter 180, Laws of 1935 (*cf.* 82.08.080), authorizing the commission to permit a seller using automatic coin vending machines to absorb the tax himself, upon making proper application.

We conclude that the statute in question requires the seller to pay the tax imposed when he fails for any reason to collect it; that the use of the bracket system authorized by the statute and adopted by the commission is reasonable and is designed to accomplish the purposes of the tax law as effectively as possible; that the law is neither arbitrary nor discriminatory and violates no constitutional right of the appellants.

The judgment is affirmed.

ROSELLINI, J.

We concur:

DONWORTH, J.

SCHWELLENBACH, J.

FINLEY, J.

FOSTER, J.

APPENDIX II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Tuesday, March 19, 1957

DON W. WHITE, B. C. THOMSON and ALVIN HANSON, dba. KITSAP AUTOMATIC DISPENSER CO., F. M. HIGGINS, WM. J. HIGGINS, PETER S. HIGGINS and DALE FISHER, dba. AUTOMATIC MERCHANDISERS, SPACARB OF THE NORTHWEST, INC., a Washington corporation, ORIE A. SMALL and JAMES P. WORDEN, JR., dba. PACIFIC AUTOMATIC, FRANK RUSSO, dba. EVERGREEN BEVERAGE CO., D. J. CLAUSEN, JR., dba. INLAND VENDING SERVICE, CARTER W. DULLANTY and GEORGE K. LINDBERG, dba. BEVERAGE VENDING SERVICE COMPANY, AUTOMAT CO., INC., a Washington corporation, JOHN NECHANICKY and VIT NECHANICKY, dba. CANTEEN COMPANY OF WASHINGTON, RICHARD E. NECHANICKY, dba. AUTOMATIC CANTEEN CO. of Spokane, *Appellants,*

vs.

THE STATE OF WASHINGTON, *Respondent.*

Judgment No. 33651 Thurston County. No. 27864

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 19th day of March, A.D. 1957, on motion of John J. O'Connell, Esquire, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said The State of Wash-

ington have and recover of and from the said Don W. White, B. C. Thomson and Alvin Hanson, dba. Kitsap Automatic Dispenser Co., F. M. Higgins, Wm. J. Higgins, Peter S. Higgins and Dale Fisher, dba. Automatic Merchandisers, Spacarb of the Northwest, Inc., a Washington corporation, Orie A. Smith and James P. Worden, Jr., dba. Pacific Automatic, Frank Russo, dba. Evergreen Beverage Co., C. J. Clausen, Jr., dba. Inland Vending Service, Carter W. Dullanty and George K. Lindberg, dba. Beverage Vending Service Company, Automat Co., Inc., a Washington corporation, John Nechanicky and Vit Nechanicky, dba. Canteen Company of Washington, Richard F. Nechanicky, dba. Automatic Canteen Co. of Spokane, and from the Hartford Accident and Indemnity Company, surety to the extent of Two Hundred and No/100 ($200.00) Dollars, the costs of this action taxed and allowed at Two Hundred sixty-one and 31/100 Dollars ($261.31), and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Judgment of Record
in Journal 41
at page 571

Office of the
Clerk of the Supreme Court

APPENDIX III

a. Text of Pertinent Portions of Laws of the State of Washington of 1935, as amended.

"There is levied and there shall be collected a tax on each retail sale in this state equal to three per cent of the selling price . . . " RCW 82.08.020

"The tax hereby imposed shall be paid by the buyer to the seller and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the tax commission pursuant to the provisions of RCW 82.08.060. The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the commission. . . .

"In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay it to the commission in the manner prescribed by this chapter, whether such failure is the result of his own acts or the result of acts or conditions beyond his control, he shall, nevertheless, be personally liable to the state for the amount of the tax. . . . " RCW 82.08.050

"The tax commission shall have power to adopt rules and regulations prescribing methods and schedules for the collection of the tax required to be collected by the seller from the buyer under this chapter. The methods and schedules prescribed shall be adopted so as to eliminate the collection of fractions of one cent and so as to provide that the aggregate collections of all taxes by the seller shall, in so far as practicable, equal the amount of tax imposed by this chapter. Such schedules may provide that no tax need be collected from the buyer upon sales below a stated sum and may be amended from time to time to accomplish the purposes set forth herein." RCW 82.08.060

"Each seller, on or before the fifteen day of the month succeeding the end of each bimonthly period, shall make out a return for the preceding bimonthly period, . . . setting forth the amount of all sales, nontaxable sales, taxable sales, the amount of tax thereon, and such other information as the commission may require, sign, and transmit the same to the commission. . . . The tax accrued under the provisions of this chapter, whether or not collected from the buyer shall be paid by the seller to the commission in bimonthly installments at the time of transmitting the return above provided for." RCW 82.08.070

"Whoever . . . refunds, remits, or rebates to a buyer, either directly or indirectly and by whatever means, all or any part of the tax levied by this chapter, . . . shall be guilty of a misdemeanor." RCW 82.08.120

"If, upon application by a taxpayer for a refund . . ., it is determined by the tax commission that . . . a tax has been paid in excess of that properly due, the excess amount paid . . . shall be credited to the taxpayer's account or shall be refunded to the taxpayer at his option . . .

" . . . Interest at the rate of three per cent per annum shall be allowed by the tax commission and by any court on the amount of any refund or recovery allowed to a taxpayer . . . " RCW 82.32.060.

"Any person, having paid any tax, original assessment, additional assessment, or corrected assessment of any tax, may apply to the tax commission, within the time limitation for refund provided in this chapter, by petition in writing for a hearing and correction of the amount paid, in which petition he shall set forth the reasons why the hearing should be granted, and the amount in which the tax, interest, or penalty, should be refunded. The commission shall promptly consider

the petition, and may grant or deny it. If denied, the petitioner shall be notified by mail thereof forthwith; if a hearing is granted, the commission shall notify the petitioner by mail of the time and place fixed therefor. After the hearing the commission may make such order as may appear to it just and lawful, and shall mail a copy of its order to the petitioner." RCW 82.32.170.

"Any person . . . having paid any tax as required and feeling aggrieved by the amount of tax may appeal to the Superior Court of Thurston County. . . .

"The trial in the superior court on the appeal shall be *de novo* and without the necessity of any pleadings other than the notice of appeal. The burden shall rest upon the taxpayer to prove that the tax as paid by him is incorrect, either in whole or in part, and to establish the correct amount of the tax. . . . Either party shall be allowed to appeal to the Supreme Court in the same manner as other civil actions are appealed to that court." RCW 82.32.180

b. Text of Ruling of the Washington Tax Commission issued March 21, 1951, effective April 1, 1951, Vol. VII, AR. No. 3.

"BRACKET SYSTEM FOR THE COLLECTION OF RETAIL SALES TAX

"Chapter 44 of the Laws of 1951, abolishing the use of tax tokens in the collection of the Retail Sales Tax, becomes effective on April 1, 1951.

"The Tax Commission, under the authority of Sec. 82.08.060, RCW, as amended by said Chapter 44 of the Laws of 1951, has adopted the following schedule to govern the collection of the Retail Sales Tax on all sales of tangible personal property made on and after April 1, 1951, to-wit:

"Amount of Sale	Tax Due
1¢ to 13¢	No tax
14¢ to 49¢	1 cent
50¢ to 84¢	2 cents
85¢ to $1.14	3 cents
$1.15 to $1.49	4 cents
$1.50 to $1.84	5 cents
$1.85 to $2.14	6 cents

Et cetera."

JUL 5 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1956

No. 1079

DON W. WHITE; B. C. THOMPSON and ALVIN HANSON, d b a KITSAP AUTOMATIC DISPENSER CO.; F. M. HIGGINS; WM. J. HIGGINS, PETER S. HIGGINS, and DALE FISHER, d b a AUTOMATIC MERCHANDISERS; SPACARB OF THE NORTHWEST, INC., a Washington Corporation; ORIE A. SMALL and JAMES P. WORDEN, JR., d b a PACIFIC AUTOMATIC; FRANK RUSSO, d b a EVERGREEN BEVERAGE CO.; C. J. CLAUSEN, JR., d b a INLAND VENDING SERVICE; CARTER W. DULLANTY and GEORGE K. LINDBERG, d b a BEVERAGE VENDING SERVICE COMPANY; AUTOMAT CO., INC., a Washington corporation; JOHN NECHANICKY and VIT NECHANICKY, d b a CANTEEN COMPANY OF WASHINGTON; RICHARD F. NECHANICKY, d b a AUTOMATIC CANTEEN CO. OF SPOKANE, *Appellants*,

v.

STATE OF WASHINGTON, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

JOHN J. O'CONNELL,
Attorney General,

KEITH GRIM,
Assistant Attorney General

Of Counsel:
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STATE PRINTING PLANT, OLYMPIA, WASH. 1956

IN THE

SUPREME COURT

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v.

STATE OF WASHINGTON, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the Supreme Court of Washington be affirmed on the ground that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument. In the alternative appellee moves that the appeal be dismissed on the ground that it does not present a substantial Federal question.

I.

STATEMENT OF FACTS AND ISSUES ON APPEAL

This appeal is from a decision of the Washington Supreme Court rendered January 28, 1957, reported at 149 Wash. Dec. 684, 306 P. (2d) 230, holding that appellants are not entitled to any refund of sales tax paid to the state of Washington.

Appellants sell merchandise through automatic vending devices at prices ranging from 5¢ to 13¢. Such sales are subject to Washington's sales tax and appellant paid to the state the correct amount of tax on all such sales made by them. Contrary to appellants' assertions, *all* sellers are required to pay tax to the state in an amount determined by multiplying their total gross sales by the rate (3%) of the tax whether they collect the tax from their buyers or not and regardless of whether such failure to collect it results from conditions beyond their control. Those selling through vending machines are expressly authorized by the statute to absorb the tax.

Washington's sales tax law requires sellers to collect the tax from buyers in accordance with a collection schedule promulgated by the Tax Commission. The collection schedule adopted by the commission provides that no tax shall be collected from the buyer on sales for less than 14¢. One cent of tax is to be collected by the seller on sales from 14¢ to 49¢, two cents on sales from 50¢ to 84¢, three cents on sales from 85¢ to $1.14, and so on. The schedule is thus formulated so that the aggregate collection by sellers will equal the amount of tax imposed under the statute as nearly as is possible and reasonable by the use of Federal coins.

The issue, simply stated, is whether the one who pursues a business in which all his sales are for less than 14¢ is unconstitutionally discriminated against by a statute which requires all sellers to pay to the state sales tax computed upon total gross sales, and which authorizes a collection schedule which provides that all sellers shall collect no tax upon sales below 14¢.

II.

ARGUMENT

No substantial Federal question is presented.

Appellants contend that the state's demand from them violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Appellants assert such issue is presented because the tax is imposed upon sellers who vend articles for less than thirteen

cents, while no such tax is imposed upon other sellers. This is not so.

It is the clear holding of the Washington Supreme Court that *all* sellers must remit 3% of their total gross sales to the state as tax. Thus, for example, drug, variety and ten cent stores and hot dog stands each pay to the state as sales tax 3% of their total gross sales, regardless of how much tax they may collect from their customers. Usually the amount of tax collected from their customers by such stores will approximate the amount that they must remit to the state, because under the schedule they will overcollect on some items, while undercollecting on others.

Appellants, however, are unable to recover the tax as do most businesses simply because they limit all their sales to amounts for which no tax is to be collected from buyers under the schedule. This consequence, which results entirely from appellants' method of doing business, produces the alleged discrimination. This identical issue concerning the effects of a collection schedule on vendors of low priced articles has been presented to the highest appellate courts of six other states. Each court has upheld the constitutionality of the tax as applied:

State v. Woods (1942), 242 Ala. 184, 5 So. (2d) 732;

State v. Baker's Ice Cream Service, Inc., (1950), 254 Ala. 311, 48 So. (2d) 230;

Stevens Enterprises, Inc. v. State Tax Comm'n, (1956) 179 Kan. 696, 298 P. (2d) 326;

F. W. Woolworth Co. v. Gray, (1951) 77 N. D. 757, 46 N. W. (2d) 295;

Wilson v. City of Philadelphia, (1938) 330 Pa. 350, 198 Atl. 893;

Smoky Mountain Canteen Co. v. Kizer, (1952) 193 Tenn. 598, 247 S. W. (2d) 69;

W. F. Jensen Candy Co. v. State Tax Comm'n, (1936) 90 Utah 359, 61 P. (2d) 629.

See also:

Roth Drugs v. Johnson, (1936) 13 Cal. App. (2d) 720, 57 P. (2d) 1022;

Mouledoux v. Maestri, (1941) 197 La. 525, 2 So. (2d) 11;

W. S. Libbey Co. v. Johnson, (1953) 148 Me. 410, 94 A. (2d) 907;

W. T. Grant Co. v. Joseph, (1957) 2 N. Y. (2d) 196, 140 N. E. (2d) 244.

There is contrary *dicta* in one opinion: *Winslow-Spacarb, Inc. v. Evatt*, (1945) 144 Ohio 471, 59 N. E. (2d) 924.

The fact that most of the above cases arose in states where the sales tax is imposed directly on the vendor, rather than upon the buyer, as is Washington's tax, is immaterial here, for under either type of tax the complaining taxpayers were unable to collect the tax from their buyers because all of their sales were for amounts below the minimum of the bracket, whereas their competitors, who sold items variously priced, were able to recoup the tax from their customers. No more discrimination exists

under the one type of tax than under the other. Substance, not form, controls.

> "In passing on the constittionality of a tax law 'we are concerned only with its practical operation, not its definition or the precise form of the descriptive words which may be applied to it.'" *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. ed. 888, 61 S. Ct. 586.

A. The Schedule Does Not Discriminate Against Appellants

Appellants apparently contend that the mere establishment of a collection schedule thereby classifies all sellers who choose to limit themselves to one bracket within the schedule. But the collection schedule applies uniformly to every single retailer in the State of Washington—none are excepted, all are treated alike. The particular effects upon appellants which flow from the schedule are entirely the result of appellants' chosen methods of doing business.

The schedule does classify sales by amounts for purposes of fixing the amount of tax to be collected upon each sale. But such classification applies alike to every retailer. It has no specific application to appellants as a separate group; it applies generally.

> "The operation of a general rule will seldom be the same for everyone. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict." *Fox v. Standard Oil Co. of New Jersey*, (1934) 294 U. S. 87, 79 L. ed. 780, 55 S. Ct. 333.

B. The Schedule is Reasonable and Founded on Just Considerations of Tax Policy

The Fourteenth amendment was not intended to compel a state to adopt an iron rule of equal taxation. *Bell's Gap R. Co. v. Penna.* (1889), 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533.

The presumption of constitutionality of a state tax can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. *Madden v. Kentucky* (1939), 309 U. S. 83, 84 L ed. 590, 60 S. Ct. 406.

> "Any classification however is permissible which has a reasonable relation to some permitted end of governmetnal action, * * * It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.'" *Watson v. State Comptroller*, (1920) 254 U. S. 122 at 125, 65 L. ed. 170, 41 S. Ct. 43.

The purpose of the collection schedule is to provide a workable system for collection of the sales tax by retailers through the exclusive use of Federal coins. By providing that sellers shall absorb the tax when it amounts to less than one half of a cent and that buyers shall pay a full cent of tax where the tax due is more than one half a cent, the need for burdensome tax tokens or scrip is obviated. Further, computation of the amount of tax to be paid on a given transaction is made much easier. Sellers and buyers alike are provided with a reasonable, common sense method for payment of the sales tax, which at

best is a troublesome matter. These are the reasons for the adoption and application of the schedule.

That the schedule affects appellants adversely because of the way they happen to conduct business is quite fortuitous. Its consequences as to them are not the result of hostile or arbitrary discrimination on the part of the legislature but flow from their own business arrangements. The legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships. *New York Rapid Transit Corp. v. N. Y. C.*, (1937) 303 U. S. 573, 82 L. ed. 1024, 58 S. Ct. 721.

If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. *Brown-Forman Co. v. Kentucky*, (1909) 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578.

The convenience afforded the public through application of a collection schedule justifies, indeed demands, such a schedule. But a schedule must have a beginning—a minimum sum below which no tax is to be collected. Such a classification is reasonable, and fully justified by considerations of sound tax policy.

Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for a difference in tax treatment of small incomes or small taxpayers and that meted

out to others. *Carmichael v. Southern Coal Co.*, (1937), 301 U. S. 495, 81 L. ed. 1250, 57 S. Ct. 868. Different treatment may be accorded two kinds of tax subjects because of differences in the difficulties and expense of tax collection between those subjects. *Madden v. Kentucky*, (1939) 309 U. S. 83, 84 L. ed. 590, 60 S. Ct. 406.

Wherefore, appellee prays that the appeal in this case be dismissed or, in the alternative, that the judgment herein be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

No. [redacted] 184

DON W. WHITE; B. C. THOMSON and ALVIN HANSON, d b a. KLISAP AUTOMATIC DISPENSER CO.; E. M. HIGGINS, WM. J. HIGGINS, PETER S. HIGGINS and DALE FISHER, d b a AUTOMATIC MERCHANDISERS; SEACARB OF THE NORTHWEST, INC., a Washington corporation; ORIE A. SMALL and JAMES P. WORDEN, JR., d b a PACIFIC AUTOMATIC; FRANK RUSSO, d b a EVERGREEN BEVERAGE CO.; C. J. CLAUSEN, JR., d b a INLAND VENDING SERVICE; CARTER W. DULLANTY and GEORGE K. LINDBERG, d b a BEVERAGE VENDING SERVICE COMPANY; AUTOMAT CO., INC., a Washington corporation; JOHN NECHANICKY and VIT NECHANICKY, d b a CANTEEN COMPANY OF WASHINGTON; RICHARD P. NECHANICKY, d b a AUTOMATIC CANTEEN CO. OF SPOKANE, *Appellants*,

vs.

THE STATE OF WASHINGTON, *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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THE ARGUS PRESS, SEATTLE

In the

Supreme Court of the United States

No. 1079

DON W. WHITE; B. C. THOMSON and ALVIN HANSON, d/b/a KITSAP AUTOMATIC DISPENSER CO.; F. M. HIGGINS, WM. J. HIGGINS, PETER S. HIGGINS and DALE FISHER, d/b/a AUTOMATIC MERCHANDISERS; SPACARB OF THE NORTHWEST, INC., a Washington corporation; ORIE A. SMALL and JAMES P. WORDEN, JR., d/b/a PACIFIC AUTOMATIC; FRANK RUSSO, d/b/a EVERGREEN BEVERAGE CO.; C. J. CLAUSEN, JR., d/b/a INLAND VENDING SERVICE; CARTER W. DULLANTY and GEORGE K. LINDBERG, d/b/a BEVERAGE VENDING SERVICE COMPANY; AUTOMAT CO., INC., a Washington corporation; JOHN NECHANICKY and VIT NECHANICKY, d/b/a CANTEEN COMPANY OF WASHINGTON; RICHARD P. NECHANICKY, d/b/a AUTOMATIC CANTEEN CO. OF SPOKANE, *Appellants*,

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In the

Supreme Court of the United States

DON W. WHITE; B. C. THOMSON and ALVIN HANSON, d/b/a KITSAP AUTOMATIC DISPENSER CO.; F. M. HIGGINS, WM. J. HIGGINS, PETER S. HIGGINS and DALE FISHER, d/b/a AUTOMATIC MERCHANDISERS; SPACARB OF THE NORTHWEST, INC., a Washington corporation; ORIE A. SMALL and JAMES P. WORDEN, JR., d/b/a PACIFIC AUTOMATIC; FRANK RUSSO, d/b/a EVERGREEN BEVERAGE CO.; C. J. CLAUSEN, JR., d/b/a INLAND VENDING SERVICE; CARTER W. DULLANTY and GEORGE K. LINDBERG, d/b/a BEVERAGE VENDING SERVICE COMPANY; AUTOMAT CO., INC., a Washington corporation; JOHN NECHANICKY and VIT NECHANICKY, d/b/a CANTEEN CO. OF WASHINGTON; RICHARD P. NECHANICKY, d/b/a AUTOMATIC CANTEEN CO. OF SPOKANE, *Appellants,*

vs.

THE STATE OF WASHINGTON, *Appellee.*

No. 1079

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

I.

COUNTER-STATEMENT OF THE CASE

Before answering the argument of appellee in support of its Motion to Dismiss or Affirm, it is logical to

dispose of any implication which may be in its brief that appellants have made erroneous statements concerning who pays the Washington Retail Sales Tax and on whom this tax is imposed. In the Jurisdictional Statement appellants stated that the Retail Sales Tax Law of the State of Washington imposes a tax collected from appellants on their sales, all of which were for thirteen cents (13¢) or less, without such a tax being collected from sellers of merchandise for fourteen cents (14¢) or more, and that the effect of this law as interpreted by the Supreme Court of the State of Washington is to impose upon sellers of merchandise at retail for amounts between one cent (1¢) and thirteen cents (13¢) a three per cent (3%) tax on the gross amount of such sales, while no such or similar tax is imposed on other sellers. In its Motion to Dismiss or Affirm, appellee says this is not so and that contrary to appellants' assertions, all sellers are required to pay tax to the state in an amount determined by multiplying their total gross sales by the rate (3%) of the tax.

The constitutionality of tax measures is not decided upon niceties of language or by considering only the entity which ultimately makes the remittance to the taxing authority, here the sellers.

> "... The descriptive pigeonhole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' *Henderson v. New York* (*Henderson v. Wickham*) 92 U.S. 259, 268, 23 L.ed. 543, 547. Such has been the repeated import of the

cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that 'in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence v. State Tax Commission,* 286 U.S. 276, 280, 76 L.ed. 1102, 1105, 52 S.Ct. 556, 87 A.L.R. 374." *Wisconsin v. J. C. Penney Co.* (1941) 311 U.S. 435, 443, 61 S.Ct. 246, 85 L.ed. 267, 270.

"... It hardly is necessary to repeat that when this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the state, but rather *upon the practical operation and effect of the tax as applied and enforced.*" *Wagner v. Covington* (1919) 251 U.S. 95, 102, 40 S.Ct. 93, 64 L.ed. 157, 167. (Emphasis added)

"In passing on the constitutionality of a tax law 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence v. State Tax Commission,* 286 U.S. 276, 280, 76 L.ed. 1102, 1105, 52 S.Ct. 556, 87 A.L.R. 374 ..." *Nelson v. Sears, Roebuck & Co.* (1941) 312 U.S. 359, 363, 61 S.Ct. 586, 85 L.ed. 888, 891.

There can be no dispute concerning the practical operation and effect of the Washington Retail Sales Tax as applied and enforced under the statute, the regulations issued pursuant thereto and the Washington Supreme Court interpretation thereof. It is acknowledged that the Washington court has held that all sellers must remit three per cent (3%) of their total gross

sales to the state as tax. The appellee makes this statement as if it automatically decides the constitutional issue now before this court. However, this remittance requirement tells only half the story, the remainder is the important part, the practical operation of the Washington Retail Sales Tax Law.

The statute provides that "There is levied and there shall be collected a tax on each retail sale . . ." RCW 82.08.020. The duty of paying the tax is upon the buyer, and the seller is required to collect the tax from the buyer. RCW 82.08.050. The seller is prohibited from in any way absorbing the tax,* RCW 82.08.120, although he must nevertheless remit three per cent (3%) of his gross sales, Washington Supreme Court Decision (R. 75). The schedule by which collections are made by the seller from the buyer is established by a ruling of the Washington Tax Commission (Juris. St. 33) and is such that the seller is prohibited from collecting on sales for amounts between one cent (1¢) and thirteen cents (13¢), inclusive. The Washington Supreme Court has now held that sellers must remit to the state as and for the retail sales tax three per cent (3%) of all sales made without regard to this statutory prohibition and this holding is conclusive here. Thus

*The fact that appellants are vending machine operators has nothing to do with the question now before the court; it is completely immaterial. The discrimination of which appellants complain is based on the selling price of merchandise. It applies whether or not the sale is through a vending machine; no seller can collect the tax from his buyer on a sale for less than fourteen cents (14¢). RCW 82.08.080 gives a vending machine operator authority to absorb a tax which he would otherwise collect from a buyer when there has been appropriate administrative application and action. However, no such application or action has taken place as to appellants nor does this statutory authorization have any effect on one cent (1¢)—thirteen cents (13¢) sales; collection from buyers in these low-priced transactions is prohibited in any event.

it is clear that the natural and reasonable effect and the practical operation of the Washington Retail Sales Tax Law is that sellers of merchandise for amounts between one cent (1¢) and thirteen cents (13¢), inclusive, must pay the tax themselves, whereas sellers of merchandise for amounts of fourteen cents (14¢) and more do not, unless of course they fail to fulfill the statutory requirement that they collect it from their buyers.

Viewing the situation by the well-established rule that the constitutionality of a tax is to be determined by considering the practical operation of the tax measure, we resubmit that the effect of the statute involved as interpreted by the Supreme Court of the State of Washington is to impose upon sellers of merchandise at retail for amounts between one cent (1¢) and thirteen cents (13¢) a three per cent (3%) tax on the gross amount of such sales, while no such or similar tax is imposed on other sellers.

II.

ARGUMENT

Appellee's Motion to Dismiss or Affirm is made pursuant to paragraph 1 of Rule 16 of the Revised Rules of the Supreme Court of the United States. The motion to dismiss comes under subparagraph (b) of that rule and concerns "a substantial federal question." The motion to affirm comes under subparagraph (c) and refers to unsubstantial questions. It is obvious that a federal question is involved, and appellee does not claim otherwise. Consequently the only issue under both of appellee's motions is whether or not a "sub-

stantial" question is presented by appellants. Therefore, both motions may be argued as one. If a substantial question is presented, both motions should be denied; if it is not, both motions should be granted.

Appellee's argument is that its motion is well taken for the general reason that a number of state courts have upheld the constitutionality of a sales tax, and for the specific reasons that (a) there is no classification to which appellants can object because the effects of which appellants complain are "entirely the result of appellants' chosen methods of doing business" (Appellee's motion, page 10) and (b) if there is a classification, it is one founded on reasonable considerations of tax policies.

However, the mere fact that the same constitutional issue which appellants are raising in this case has heretofore been raised in a number of states in itself indicates that a substantial question exists. A majority of the cases arose in states where the sales tax is imposed directly on the seller, but the other cases are entitled to more weight since they involve a tax upon the buyer, which is the situation in the State of Washington. Appellee apparently contends that all of the cases uphold the constitutionality of the sales tax statutes involved, claiming that the statements directly contra to appellee's position in *Winslow-Spacarb, Inc. v. Evatt, Tax Commissioner* (1945) 144 Ohio 471, 59 N.E.(2d) 824, are dicta. The pertinent paragraph in this case is:

> "It is always the duty of a court to construe a statute, if possible, in a manner to give it a constitutional operation. In accordance with such rule Section 5546-12a, General Code, should be inter-

preted as excluding a vendor wholly engaged in the making of separate sales of a commodity at a price less than nine cents per unit, such sales not being taxable under the express terms of Section 5546-2, General Code. If Section 5546-12a were to be applied to such a vendor who collects no tax from the consumer, the vendor would be paying three per cent on his gross retail sales entirely out of his own pocket, while other vendors in the same vicinity, selling similar and other commodities, some of their sales being taxable and others not, would have the privilege and advantage of deducting 'the amount of tax paid to the state by means of canceling prepaid tax receipts' for which expenditure they have been reimbursed by the consumer, thus placing them in a more favored position and in some instances, at least, causing them to pay little or nothing. The result would be an unfair discrimination among vendors, in violation of the equal protection clauses of Section 2, Article I of the Constitution of Ohio and the 14th Amendment to the Constitution of the United States." *Winslow-Spacarb, Inc. v. Evatt, Tax Commissioner* (1945) 144 Ohio 471, 59 N.E.(2d) 824, 826.

We submit that it does not constitute dicta but is an authoritative opinion of the highest court of the State of Ohio. The Ohio Supreme Court was setting forth one of its reasons for holding that sellers of small-priced merchandise did not have to pay the Ohio sales tax: if it should interpret the statute otherwise, the statute would be unconstitutional because it would then impose a tax upon sellers of merchandise for small amounts while no such or similar tax would be imposed on other sellers. This is an opinion of the highest tri-

bunal of a state directly supporting appellants' contention in this case.

One other state, where the burden of the tax is primarily on the buyer, has a decision indicating that its highest tribunal would in all probability come to the same conclusion as the Ohio Supreme Court. In *Mouledoux v. Maestri* (1941) 197 La. 525, 2 So.(2d) 11, a seller located in the City of New Orleans claimed that an ordinance very similar to the Washington Retail Sales Tax Law violated the uniformity provisions of the Louisiana State Constitution because, among other things, he was required to return a stated percentage of his gross sales as tax. The court held that there was no constitutional violation and in doing so specifically stated that the seller "is required to report only the actual taxes collected, regardless of the percentage of those taxes to his gross receipts. . . . In order to make this doubly clear, the amendatory ordinance adopted by the Commission Council indubitably required the dealer to report only the tax actually collected by him from the purchaser, user or consumer. Proof in the record shows that this was being carried out in the practical application of the provisions of the ordinance under attack." 2 So.(2d) p. 22. Thus, although there is no statement in the case to the effect that if a seller had been required to remit a percentage of his gross receipts there would be an unconstitutional violation, the clear implication is that the Louisiana court would so hold.

It is not surprising that the legal battle, extending from 1936 to 1956, over the imposition of state sales taxes upon sellers of low-priced merchandise without

imposing the tax on sellers of higher-priced merchandise has in the majority of instances been decided in favor of the taxing authority since only state courts have had these taxing measures under consideration. However, there is a respectable minority. Also, it must be remembered that our federal constitution provides that the ultimate authority over such controversies between individual taxpayers and taxing states is the United States Supreme Court which has always been solicitous of the plight of the individual in such matters, and no federal court has ever passed upon the point. It is to be expected that the same issue will arise continuously in the future until it is decided by the highest federal tribunal. We believe that the time has come for the federal constitutional questions involved to be decided by the United States Supreme Court. It is submitted that not only does the fact that the issue has arisen in a number of state courts show that a substantial question exists, but that this court should, in any event, decide this vexing problem now.

A. Existence of Classification

Appellee apparently contends that no classification at all exists, that the Washington Retail Sales Tax has no different effect upon sellers of 1¢-13¢ priced articles and sellers of higher-priced merchandise, that the tax measure does not place sellers of low-priced merchandise in a different classification from other sellers, because the collection schedule applies to each and every retailer and that the discriminatory effects to which appellants object are merely the result of appellants voluntarily doing business in a certain manner.

It is submitted that this attitude ignores the realities of the situation and the stipulated facts. Appellants, as sellers of merchandise for amounts between one cent (1¢) and thirteen cents (13¢), inclusive, have paid the retail sales tax out of their own pockets, with any chance for reimbursement by their buyers prohibited by the statute and the rule establishing the bracket system. However, sellers of merchandise for amounts of fourteen cents (14¢) and over are reimbursed by their buyers for the tax which they pay and, in fact, are required by the statute to secure reimbursement. Obviously, this difference in the incidence of the tax is a classification; sellers of low-priced merchandise have the tax burden placed upon them, whereas sellers of other priced merchandise do not.

Even though the collection schedule by its terms applies to every Washington seller, the requirements that each seller pay three per cent (3%) of his gross sales to the state and that each seller collect the tax from his buyer unless the sale is for an amount between one cent (1¢) and thirteen cents (13¢) in which event the seller is prohibited from collecting the tax from his buyer, have the practical effect of shifting the incidence of the Washington Retail Sales Tax from buyers to sellers where sales of the low-priced merchandise are involved. To say that no difference exists in the effect of the law upon sellers of merchandise above and below the thirteen cent-fourteen cent (13¢-14¢) line ignores the practical operation and effect of the tax measure which is really the essential consideration.

Appellee contends this discriminatory practical classification is immaterial by saying that it does not result from the statute but from appellants so conducting their business as to be hurt by it, and if appellants do not want this result they should conduct some other business. Supposedly such a statement could be said about any unconstitutional tax: it is not the taxing statute which does the harm, but the taxpayer so conducting his business as to come within its unconstitutional clutches. Such an attitude would render the Constitution a nullity. Certainly, all taxpayers are entitled to the protection afforded by the Fourteenth Amendment to the business which they are conducting. Constitutional provisions are to be applied to situations as they exist. The constitutionality of specific taxation is determined by the practical effect it has upon existing conditions, not by what effect it might have if the taxpayer changed his business.

The point is perhaps best brought out by examining some of the equal protection cases decided by this court:

Stewart Dry Goods Co. v. Lewis (1935) 294 U.S. 550, 55 S.Ct. 525, 79 L.ed. 1054, involved a case where the State of Kentucky was enjoined from imposing a gross sales tax wherein the rate of return increased within established brackets. It could have been argued that the Kentucky collection schedule applied uniformly to every seller in the State of Kentucky and that the particular effects upon specific sellers was simply the result of their chosen method of doing business, just as appellee does at page 10 of its motion. This court held, however, that the Kentucky Act taxed sales in an unequal and arbitrary way, classifying them for

the imposition of different rates without reference to any real or substantial distinction, and held the tax unconstitutional.

Quaker City Cab Co. v. Pennsylvania (1928) 277 U.S. 389, 48 S.Ct. 553, 72 L.ed. 927, involved a Pennsylvania tax upon the gross receipts of transportation companies, the tax being levied upon corporations but not upon individuals or partnerships. Again the argument could have been made that the discriminatory effect upon the taxpayer resulted simply from the choice of doing business as a corporation. Such an argument would not have made any more sense in the Pennsylvania case than it does in this one.

Hartford Steam Boiler Inspection and Insurance Company v. Harrison (1937) 301 U.S. 459, 57 S.Ct. 838, 81 L.ed. 1223, involved a statute which provided that a salaried employee could not be a licensed agent of any type of insurance company except a mutual insurance company. If the argument made by appellee in the case at bar were applied to the *Hartford* case, the appellee would say that there was no discrimination since the statute applied to all insurance companies and Hartford could change its method of doing business and appoint an agent who was not a salaried employee if it wanted to avoid the effect of the law. Of course, no such argument was made, or at least it was not mentioned in the decision holding the statute unconstitutional as a violation of the equal protection clause.

Louisville Gas & Electric Co. v. Coleman (1928) 277 U.S. 32, 48 S.Ct. 423, 72 L.ed. 770, involved the constitutionality of a tax on mortgages which shall be lodged for record "where the indebtedness does not mature within five years . . ." It is to be noted

> that this tax applied to every mortgagor in the State of Kentucky just as the Washington collection schedule applies to every seller. Also its particular effect depended entirely upon whether a mortgagor took a mortgage maturing in more or less than five years, just as the particular effect of the Washington tax measure depends entirely upon whether a retailer sells for thirteen cents (13¢) or fourteen cents (14¢). Any particular mortgagor could avoid the tax by taking only mortgages maturing within five years, just as any particular Washington seller can avoid the tax here involved by selling higher priced items. This court did not tell the taxpayer that there was no constitutional violation because if it wished it could limit its mortgages to five-year maturity periods, but held that a classification existed and was arbitrary and, therefore, that the statute was unconstitutional.

The practical effect of the Washington Retail Sales Tax upon sellers of merchandise for one cent (1¢) to thirteen cents (13¢), inclusive, is so drastically different from that upon other sellers that it seems to us that there is no question but that the statute creates a distinctive classification of sellers. The tax is imposed on each retail sale. RCW 82.08.020. Each time a sale is made for fourteen cents (14¢) and over the seller thereof is required to collect the tax. RCW 82.08.050 and Ruling of the Washington Tax Commission Relative to the Bracket System. Each time a sale is made for less than fourteen cents (14¢), the seller is prohibited from collecting the tax. Ruling of the Washington Tax Commission Relative to the Bracket System. Both types of sellers are required to pay an amount equiva-

lent to three per cent (3%) of their gross sales to the state as tax. Opinion of the Washington Supreme Court (R. 75). This certainly creates a different effect upon sellers, depending upon whether their sales are one side or the other of the 13¢-14¢ line. The tax incidence is upon the seller when he sells merchandise at less than fourteen cents (14¢), whereas the tax incidence is on the buyer when the seller sells merchandise at fourteen cents (14¢) or more. Surely as a practical matter this taxing method creates a classification.

B. Reasonableness of Classification

In the last part of appellee's argument supporting the Motion to Dismiss or Affirm, the contention is made that the classification, if one exists, is reasonable so as to be a difference permitted by the equal protection clause of the Fourteenth Amendment. Appellee points out that the Constitution does not impose a rigid rule of equality of taxation upon a state, and this is readily acknowledged. However, appellee then takes the position that the collection schedule is reasonable because of administrative convenience and expense in the collection and measurement of the Washington Retail Sales Tax, and that this administrative convenience and expense is itself a sufficient justification for the different tax treatment imposed upon those who sell low-priced merchandise and those who sell high-priced articles. Appellants' position is that the reasonableness of collecting a retail sales tax *from buyers* in accordance with a bracket system such as that existing in Washington, does not justify shifting the burden of

the tax from buyers to a class of sellers selling 1¢-13¢ articles when there is no such shift to other sellers.

It is reasonable for a collection schedule to have a minimum below which no tax is collected. However, this does not justify shifting the tax burden. It does not do so in a number of states. In Florida, Maryland, Louisiana and West Virginia no one, buyer or seller, pays any sales tax on sales for small amounts ranging from 1¢-5¢ to 1¢-50¢, and in Maine, Connecticut and North Carolina partial relief is provided to those who sell articles at prices below the minimum of the applicable collection schedule. The sales tax laws of these states work well and the same could easily be done in Washington.

Even though exact equality is not attained by collecting the retail sales tax from buyers under a bracket system because of the breakage at the extremes of each bracket in the schedule, this inequality does not cause a tax measure to be unconstitutional. It is the type of administrative convenience and expense justifying a difference in tax treatment referred to in *Carmichael v. Southern Coal & Coke Co.* (1937) 301 U.S. 495, 57 S.Ct. 868, 81 L.ed. 1245, and *Madden v. Kentucky* (1940) 309 U.S. 83, 60 S.Ct. 406, 84 L.ed. 590. In the *Carmichael* case the constitutionality of an unemployment compensation tax statute was challenged because, among other things, it exempted employers of less than eight employees from the tax while imposing the tax on other employers. The law was held to be constitutional, but note that no shift in the tax burden was involved. If the statute had imposed the tax on employers of eight or

more employees and had shifted the tax to the employees when the employer had less than eight employees, we believe that this court would have had no hesitancy in declaring that such a shift in the incidence of the tax violated the equal protection clause as far as the taxed employees were concerned since employees of other employers would not be taxed. It is a similar shift of the tax burden which appellants claim causes the tax involved in the case at bar to be unconstitutional.

The statements in the *Carmichael* and *Madden* cases are perhaps more fully expressed in the following words from *Fernandez v. Wiener* (1945) 326 U.S. 340, 66 S.Ct. 178, 90 L.ed. 116,

> "Considerations of practical administrative convenience and cost in the administration of tax laws afford adequate grounds for imposing a tax on a well recognized and defined class, without attempting to extend it so as to embrace the penumbra of special and more or less casual interests which in each case may or may not resemble the tax class." 326 U.S. 360, 90 L.ed. 133.

Actually the cases referring to administrative convenience and cost of collection are only integrating the rule that strict equality of taxation is not necessary and the rule that a classification of taxpayers must be based on a real and substantial difference having a reasonable relation to the subject of the legislation. The constitutional objection to the tax measure now before the court is not that the classification of sellers into those selling merchandise above and those selling below the 13¢-14¢ line may involve instances of inequality in the administration of the tax, but that the classifica-

tion itself bears no reasonable relationship to the purpose of the legislation, to-wit, that of raising revenue. The situation is not unlike that in *Louisville Gas & Electric Co. v. Coleman* (1928) 277 U.S. 32, 48 S.Ct. 423, 72 L.ed. 770, where, in holding a tax on recorded mortgages not maturing within five years to be unconstittuional, the court said:

> "The application of the equal protection clause does not depend upon what name is given to the tax. Whether the tax now in question be called a privilege tax or a property tax, it falls in effect upon one indebtedness and not upon another where the sum of each is the same, where both are incurred by corporations or both by natural persons, where the percentage of interest to be paid is the same; where the mortgage security is identical in all respects; where, in short, the only difference well may be that one is payable in sixty months, and the other in fifty-nine months. No doubt the state may take into consideration as an element in fixing the amount of the tax the time within which the indebtedness is to be paid; for, since the tax is a flat sum covering the entire life of the lien, the privilege of recording the short-time lien and that of recording the long-time lien have different taxable values. But classification good for one purpose may be bad for another; and it does not follow that because the state may classify for the purpose of proportioning the tax, it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt." 277 U.S. 38, 72 L.ed. 774.

Appellants recognize that the unconstitutionality of

the Washington Retail Sales Tax is not without doubt. Neither appellants nor appellee would be before this Court if the question was clear either way. One of the difficulties is inherent in the issue itself since

> "the equal protection clause . . . is not susceptible of exact delimitation. No definite rule . . . which automatically will solve the question in specific instances, can be formulated." *Louisville Gas & Electric Co. v. Coleman* (1928) 277 U.S. 32, 37, 48 S.Ct. 423, 72 L.ed. 770, 773.

However, it does seem quite clear that a substantial question is presented when appellants submit that, although the bracket system set up by the Washington Tax Commission may be a reasonable method for collecting the retail sales tax from buyers, there does not exist a real and substantial difference having a reasonable relation to the raising of revenue between sellers of merchandise for one cent (1¢) to thirteen cents (13¢), inclusive, and sellers of merchandise for fourteen cents (14¢) and more which justifies requiring all sellers to pay three per cent (3%) of their gross sales to the state thus shifting the burden of the Washington Retail Sales Tax from buyers to those who sell merchandise at prices below an arbitrary line drawn at fourteen cents (14¢).

III.
SUMMARY

The invalidity of appellee's motion is highlighted by applying the ideas expressed in *Stebbins v. Riley* (1925) 268 U.S. 137, 45 S.Ct. 424, 69 L.ed. 884, to the situation. In the *Stebbins* case an inheritance tax act of the State of California was attacked as unconstitutional. During the course of the opinion, it was said:

> "The taxing statute may . . . make a classification for purposes of fixing the amount or incidence of the tax, provided only that all persons subjected to such legislation within the classification are treated with equality, and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation." 268 U.S. 142, 69 L.ed. 888.

If there is no classification involved here as appellee contends and the Washington Retail Sales Tax applies uniformly to every seller in the State of Washington, all such sellers are certainly not treated with equality. Clearly a highly inequitable situation exists under which sellers of tangible personal property at retail for amounts between one cent (1¢) and thirteen cents (13¢), inclusive, bear the incidence of the retail sales tax whereas other sellers of tangible personal property at retail do not. On the other hand, if sellers of one cent-thirteen cents (1¢-13¢) merchandise are separately classified, then whether the classification bears a reasonable relation to the production of revenue is certainly a substantial question.

It follows that appellee's Motion to Dismiss or Affirm is without merit and should be denied.

Respectfuly submitted,

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